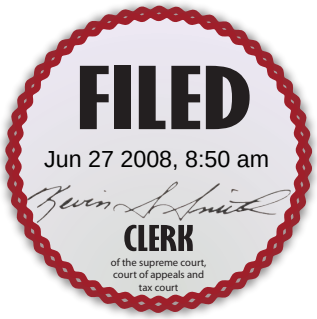

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IN THE COURT OF APPEALS OF INDIANA

STEVEN J. ROBBINS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 82A01-0710-PC-491
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No.82C01-0312-PC-25

June 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Steven Robbins appeals from the post-conviction court's denial of his petition for post-conviction relief. Robbins raises the sole issue of whether the post-conviction court erred in declining to accept Robbins's argument that the State committed misconduct by failing to disclose that a witness at Robbins's trial expected to receive a benefit in return for his testimony. Concluding the post-conviction court did not err, we affirm.

Facts and Procedural History

The following recitation of the underlying facts comes from the unpublished decision on Robbins's direct appeal.

> The facts most favorable to the judgment reveal that in June 2001, Robbins moved from Gary to Evansville to sell cocaine. Shortly thereafter, he met Brenda Douglas, who sold cocaine for him. Robbins and Douglas soon became involved in a personal relationship. Jerry Preshon also sold drugs for Robbins. . . .
>
> In August 2001, Robbins told Preshon that he was going to "pop" Douglas. Tr. p. 781. Preshon understood this to mean that Robbins intended to kill Douglas. . . .
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> ***
>
> On Friday, November 30, 2001, Robbins sold cocaine at Kevin Carter's apartment. Robbins told Carter that he was mad at Douglas because she was "messing up his drug business." Tr. p. 392. . . . Also that day, Erica Ingram purchased cocaine from Robbins. She noticed that Robbins was wearing a blue jump suit.
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> [On December 1, 2001,] Douglas was at [a] football game [and] Robbins was selling cocaine. When Robbins was at Raymond Goodwin's house, Goodwin noticed the impression of a handgun under Robbins' shirt. That same day and evening, Velma Merriweather twice noticed Robbins in the vicinity of the Coon Dog Liquor Store ("the liquor store"). She also noticed that Robbins was wearing blue coveralls. Preshon also saw Robbins and mentioned that he thought Robbins was leaving town and returning to Gary. Robbins responded that he had something to do first. Preshon understood that to mean that Robbins planned to kill Douglas before he left town with his common-law wife, Joy Kortum.

> When Douglas returned home from the football game, her brother took her to a house in the vicinity of the liquor store. . . . [Nancy] Weekly, [Vance] Archer, and Douglas walked from the liquor store to Weekly's apartment. After finishing her drink, Douglas decided to take the city bus home.
>
> A few minutes after Douglas left, at approximately 10:00 p.m., Weekly and Archer heard six gunshots. Shortly thereafter, Kevin Carter knocked at their door and told them that Douglas had been shot. Douglas died as the result of six gunshot wounds. There was no evidence that she was the victim of a robbery. Further, police officers found no weapon. They did, however, find a damaged holster at the scene.
>
> On December 5, 2001, Robbins contacted Evansville Police Department Sergeant Ted Mattingly from Gary. . . . Robbins subsequently spoke with Indiana State Police Officers and additional Evansville Police Department Officers. He was charged with Douglas' murder after officers determined that his information was not consistent with the investigative facts.
>
> At trial, several witnesses testified to the previously mentioned facts. In addition, three witnesses who lived in the vicinity of the shooting testified that they heard the gunshots and saw a black man running from the scene. Specifically, Viola Coleman testified that she heard six gunshots, looked outside, and saw a black man wearing a blue jogging suit running down the alley. Nathan Hobgood testified that he saw a black man wearing a blue sweat suit with a hood. When pressed as to whether Robbins was the man that he had seen, Hobgood responded that Robbins fit the description, but he could not say whether Robbins was the man. Lastly, Michelle Williams testified that she saw a black man wearing a dark jacket.
>
> ***
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> Finally, Preshon testified that the holster found at the crime scene belonged to Robbins. Preshon had seen it in Robbins' closet when he helped Robbins move into the Evansville apartment. Preshon also testified that he did not receive any benefit from the State in exchange for his testimony. A jury convicted Robbins of murder and adjudicated him to be an habitual offender.

Robbins v. State, No. 82A04-0208-CR-414, 792 N.E.2d 969 (Ind. Ct. App. 2003) (table), trans. denied.

On July 15, 2002, the trial court sentenced Robbins to sixty-five years for murder, enhanced by thirty years because of Robbins's habitual offender status. Robbins appealed, challenging the sufficiency of the evidence. On August 5, 2003, this court

affirmed Robbins's conviction. Id. On December 23, 2003, Robbins filed a pro se Petition for Post-Conviction Relief. On March 15, 2007, Robbins, this time represented by counsel, filed an Amendment to Verified Petition for Post-Conviction Relief. Robbins argued that there was a plea agreement between the State and Preshon, and that the State's failure to disclose this plea agreement violated his constitutional rights. On June 21, 2007, the post-conviction court held an evidentiary hearing on Robbins's petition. On September 17, 2007, the post-conviction court entered an order, along with findings and conclusions, denying Robbins's petition. Robbins now appeals the denial of his petition.

Discussion and Decision

I. Standard of Review

Post-conviction proceedings are civil in nature. Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002), cert. denied, 540 U.S. 830 (2003). Therefore, to prevail, petitioners must establish their claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Stevens, 770 N.E.2d at 745. When appealing a denial of a petition for post-conviction relief, a petitioner appeals from a negative judgment. Burnside v. State, 858 N.E.2d 232, 237 (Ind. Ct. App. 2006). Therefore, petitioners must convince this court that the evidence, taken as a whole, leads unmistakably to a conclusion opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We will review a post-conviction court's findings of fact under a clearly erroneous standard, but will review its conclusions of law de novo. Burnside, 858 N.E.2d at 237.

II. Prosecutorial Misconduct

Express plea agreements between a witness and the State, even if not reduced to writing, and even if not entered into by the prosecutor trying the instant case, must be disclosed to the jury. Newman v. State, 263 Ind. 569, 573, 334 N.E.2d 684, 687 (1975); see also Lott v. State, 690 N.E.2d 204, 211 (Ind. 1997) ("A prosecutor must disclose to the jury any agreement made with the State's witness, such as promises, grants of immunity, or reward offered in return for testimony."). The purpose of this rule is to assist the jury in assessing the witness's credibility. See Seketa v. State, 817 N.E.2d 690, 693-94 (Ind. Ct. App. 2004). The State is not required, however, to disclose a situation wherein "a witness testifies favorably in the hope of leniency, and the State neither confirms nor denies leniency to the witness." Seketa, 817 N.E.2d at 694; see also Wright v. State, 690 N.E.2d 1098, 1113 (Ind. 1997) (recognizing that "preliminary discussions [between a witness and the State] are not matters which are subject to mandatory disclosure"). "Similarly, hopes and expectations of a state witness coupled with evidence that a prosecutor-accomplice/witness deal may have been consummated after the in-court testimony is insufficient to bring a case within the Newman rule." Wright, 690 N.E.2d at 1113. Whether or not an agreement existed "is a factual question, and we will affirm the trial court's determination if substantial evidence exists." Lott, 690 N.E.2d at 211

Prior to Robbins's trial, Preshon was charged with two counts of operating a vehicle after having been adjudged an habitual traffic offender, both Class D felonies. On November 7, 2001, Preshon pled guilty without a plea agreement from the State. On December 1, 2001, Douglas was murdered. On December 4, 2001, Officer Winters

spoke with Preshon. At his trial, Robbins cross-examined Preshon about this meeting, and Preshon denied having reached an agreement regarding his testimony in Robbins's case. On December 21, 2001, Deputy Prosecutor Neil Thomas wrote a note and placed it in Preshon's file relating to one of his offenses. This note stated: "Defendant has cooperated in a murder investigation. He should get a suspended sentence." Appellant's Appendix at 57. At the post-conviction hearing, Thomas testified that he was not the prosecutor assigned to either Robbins or Preshon's case, but that he had made this note after speaking with the prosecutor in Robbins's case. He also testified that, "to the best of [his] knowledge," Preshon did not know about this note. Transcript at 22. On February 13, 2002, Preshon moved to withdraw his guilty pleas from both his pending cases. At this hearing, Preshon's counsel told the trial court that the State had told Preshon that, if he cooperated in the murder investigation, he would receive misdemeanors, and that the prosecutor now was offering suspended sentences. The trial court granted Preshon's motions, and his cases were set for trials, which would be held on August 2 and 9, 2002. On June 11, 2002, Preshon testified at Robbins's trial. The following exchange took place between the Prosecutor and Preshon:

> Q. Mr. Preshon, are you currently facing a charge of Habitual Traffic Offender?
> A. Correct.
> Q. And to your understanding, is that a Class D felony?
> A. I believe so.
> Q. And have you been told that you could face anywhere from six months up to three years on that charge?
> A. Correct.
> Q. What's the status of that charge? Have you reached an agreement with the State of Indiana?
> A. No ma'am. I go to trial on the 8th and 9th.
> Q. You've decided to take it to trial?

A. Correct.
Q. Were you facing that charge at the time that Brenda Douglas was murdered?
A. Yes.
Q. Did Brenda have anything to [do] with that charge?
A. No, ma'am.
Q. Have you been offered anything in exchange for your testimony here today by the State of Indiana?
A. No ma'am.

Id. at 59. On August 1, 2002, roughly six weeks after Robbins's trial, Preshon told the trial court in Preshon's cases that he had reached an agreement with the State, and on August 7, 2002, a plea agreement was filed in that trial court. Under this agreement, Preshon agreed to plead guilty to both charges as Class A misdemeanors, and the State agreed to recommend that he receive sentences of one year suspended on each charge.

The post-conviction court concluded that the "evidence supports the conclusion that at the time of [Robbins's] trial, there was no Plea Agreement between the State of Indiana and Preshon," and that "while Preshon may have hoped for leniency, there was certainly no clear agreement or representation to Preshon about the extent of leniency." Id. at 61. The post-conviction court also noted that Robbins had cross-examined Preshon regarding the status of his plea negotiations, and that "the jury could properly weigh the credibility of Preshon's testimony for themselves and the State is not subject to any valid claim of misconduct." Id.

We conclude the post-conviction court's finding regarding the existence of an express plea agreement at the time Preshon testified at Robbins's trial is not clearly erroneous. See Sigler v. State, 700 N.E.2d 809, 812 (Ind. Ct. App. 1998) (accepting the post-conviction court's conclusion that no agreement existed at the time disclosure would

have been required), trans. denied. Although Preshon and the State may have been in negotiations, the evidence supports the finding that no agreement had yet been reached. See Seketa, 817 N.E.2d at 694 (concluding that disclosure was not required as "there was no pending plea agreement"). Pershon withdrew his guilty plea prior to Robbins's trial, specifically indicating that he and the State had different views as to what he should receive in exchange for his testimony. At the time of Robbins's trial, Pershon was still scheduled to go to trial on both charges. Although he may have hoped to secure leniency through his testimony, our supreme court has made clear that such expectations do not require disclosure.[1] See Wright, 690 N.E.2d at 1113. We also note that the State fully disclosed to the jury the fact that Preshon had pending cases, and Robbins cross-examined Preshon on the status of any negotiations regarding his testimony. Therefore, the jury was able to assess Preshon's credibility in light of the facts as they existed at the time of his testimony, thereby fulfilling the purpose of the rule requiring the State to disclose agreements made in exchange for a witness's testimony.

As we accept the post-conviction court's finding that no express agreement existed at the time of Preshon's testimony, we likewise conclude it properly denied Robbins relief.

[1] We note that decisions of this court have criticized the "express agreement" requirement, some questioning whether this rule contravenes United States Supreme Court decisions. See Ferguson v. State, 670 N.E.2d 371, 374 n.1 (Ind. Ct. App. 1996), trans. denied; Lewis v. State, 629 N.E.2d 934, 938 n.6 (Ind. Ct. App. 1994); see also Sigler v. State, 700 N.E.2d 809, 814 (Ind. Ct. App. 1998) (Mattingly, J., dissenting), trans. denied. We need not engage in a discussion on this point here, however, as the evidence supports the trial court's finding that there was no plea agreement, express or implied, between Preshon and the State at the time Preshon testified. See also Wright, 690 N.E.2d at 1114-15 (rejecting the defendant's invitation to use his case as a vehicle to revisit the established precedent that "preliminary discussions are not matters which are subject to mandatory disclosure" (citing Lopez v. State, 527 N.E.2d 1119, 1129 (Ind. 1988); Aubrey v. State, 478 N.E.2d 70, 74 (Ind. 1985))). To find there was such an agreement, we would have to reweigh evidence, a task in which we do not engage on appeal from the post-conviction court.

Conclusion

We conclude Robbins has failed to carry his burden of establishing that the post-conviction court's decision was erroneous.

Affirmed.

BAKER, C.J., and RILEY, J., concur.